FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Petition not printed

No. 541

FRANCIS JOSEPH GRYGER,

Petitioner,

vs.

C. J. BURKE, Warden, Eastern State Penitentiary,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR THE PETITIONER

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SUPREME COURT OF THE UNITED STATES

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No. 541

FRANCIS JOSEPH GRYGER,

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vs.

C. J. BURKE, WARDEN, EASTERN STATE PENITENTIARY,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR THE PETITIONER

Opinion Below

The Supreme Court of Pennsylvania did not file an opinion.

Jurisdiction

Petitioner contends that his confinement in the Eastern State Penitentiary is a deprivation of liberty without due process of law. The Supreme Court of Pennsylvania is the highest court of the Commonwealth in which a decision in the suit could be had. Its order denying the petition for

habeas corpus was entered on May 28, 1947 (R. 45). Petitioner's motion for leave to proceed *in forma pauperis* and his petition for certiorari were filed on July 30, 1947, and granted on January 19, 1948 (R. 112). It is petitioner's contention that the order of the Supreme Court of Pennsylvania is based upon rulings adverse to petitioner's claims of constitutional right, and that therefore the jurisdiction of this Court is properly invoked under Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

1. Whether the Supreme Court of Pennsylvania ruled adversely to petitioner's claim that he was deprived of his liberty without due process of law.

2. Whether the sentencing of petitioner to life imprisonment as a fourth offender, without offering him the assistance of counsel, was a deprivation of liberty without due process of law.

3. Whether the sentencing of petitioner to life imprisonment as a fourth offender involved the application of an *ex post facto* law because one of petitioner's offenses was committed before the enactment of the Pennsylvania Habitual Criminals Act.

4. Whether the resentencing of petitioner to life imprisonment after a valid sentence had already been imposed on the same indictment subjected petitioner to double jeopardy in violation of the Fourteenth Amendment.

Statute Involved

Section 1108 of the Pennsylvania Penal Code of 1939, under which petitioner was sentenced to life imprisonment as a fourth offender, is set out in the Appendix, pp. 33-35, *infra*.

Statement

The facts which are either alleged in the petition for *habeas corpus* filed in the Supreme Court of Pennsylvania on May 15, 1947 (R. 24-38) or revealed by the certified record of the proceedings in the Court of Quarter Sessions (R. 45-110) may be summarized as follows:

On March 17, 1929, petitioner was convicted of burglary in the State of Maryland and sentenced to imprisonment for one year. He was released on January 17, 1928 (R. 43, 88-89, 97-98).[1] This was the first of the offenses on the basis of which petitioner was subsequently sentenced to life imprisonment as a fourth offender (R. 59, 89). The conviction occurred prior to the enactment of P. L. 854 of the Laws of 1929, which was reenacted as section 1108 of the Criminal Code of 1939 (Appendix, pp. 33-35 *infra*), and under which petitioner was sentenced to life imprisonment.

On April 27, 1928, petitioner was sentenced to imprisonment for one year on indictments charging him with assault and battery (R. 48-49) and carrying a concealed deadly weapon (R. 49). Later he was paroled (R. 48). This is not one of the convictions on which the subsequent sentence to life imprisonment was based.

On April 23, 1929, petitioner was convicted on Indictment No. 1107 charging him with burglary and related offenses (R. 50-52). On September 20, 1930, he was paroled (R. 89, 102). This was the second offense relied on in sentencing petitioner as a fourth offender (R. 59, 89, 99-102).

On November 26, 1930, petitioner was charged in Indictments Nos. 1679 and 1680 with robbery and entering with intent to rob (R. 52-54). He was convicted on a plea of

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[1] The man named was an "Edward Grygier" whereas petitioner's name is Francis Joseph Grygier. Since petitioner does not deny that he was the man named in the indictment (R. 92), we assume for the purposes of this proceeding that petitioner was in fact the person named.

guilty and sentenced on Indictment 1679 to not less than five nor more than ten years in the penitentiary (R. 52-54). Petitioner was paroled on May 28, 1936 (R. 90). This was the third offense relied on by the commonwealth (R. 59, 89, 103-107).

On April 26, 1937, petitioner was indicted for burglary and related offenses (Indictment No. 1046, R. 54-56) and for carrying a concealed deadly weapon (Indictment No. 1047, R. 56-57). He pleaded guilty to receiving stolen goods and was sentenced to a term of from 18 months to 3 years at the expiration of the unexpired parole sentence last mentioned (R. 56, 90, 107). The Pennsylvania Habitual Criminals Act is applicable only when the four offenses are committed each within five years of the last prior offense, but any period of servitude in a penal institution is to be excluded from the computation of the five year period. Hence, although this was not one of the convictions upon which the life sentence was based, it is relevant because it tolled the running of the five year period between offenses. Petitioner was paroled on April 29, 1943, having completed his sentence under Indictment No. 1670 and served a portion of the sentence on Indictment 1046.

On June 21, 1943, petitioner was indicted on twelve bills, each charging burglary and receiving stolen goods (Indictments Nos. 251-262 incl., R. 66-84). On July 26, 1943, he pleaded guilty to the charges of receiving stolen goods and was sentenced on the same day on each of two bills to a term of imprisonment of not less than two and a half nor more than five years, the terms to be served consecutively at the expiration of the unexpired sentence on Bill 1046 (R. 91). These indictments were not included among the offenses underlying the subsequent life sentence but they are mentioned here because they explain some of the allegations in various petitions for *habeas corpus* and the conten-

tions made by petitioner at the hearing at which the life sentence was imposed.

When petitioner was sentenced on the indictments last mentioned (Nos. 251-262, incl.) there was also pending against him Indictment No. 461 charging burglary (R. 63-64) and Indictment No. 462 charging aggravated assault and battery (R. 64-65). On June 28, 1943, petitioner pleaded not guilty to Indictments Nos. 461 and 462 (R. 64, 65). On July 26, 1943, he pleaded guilty to one count in each of Indictments Nos. 251-262 inclusive and was sentenced as stated above. Petitioner alleges that he and his attorney believed that Indictments Nos. 461 and 462 were also disposed of at that time (R. 29-95). The certified copy of the transcript of the proceedings at the imposition of sentence on Indictments Nos. 251-262 supports this allegation for its caption includes Indictments Nos. 461-462 and testimony was taken concerning the attempted burglary and assault upon Harry Haas which are alleged in the latter indictments. Nevertheless, petitioner was tried again on February 25, 1944, and found guilty. He was thereupon sentenced on Indictment 461 to not less than five nor more than ten years to be computed from the expiration of the sentence he was then serving (R. 64). This was the fourth offense relied on by the commonwealth (R. 91-92) and the one on which petitioner was later sentenced to life imprisonment.

On May 4, 1944, there was filed in the Court of Quarter Sessions an information relative to Indictment No. 461 charging that petitioner had been found guilty of burglary as set forth in that indictment "having been previously convicted and sentenced on certain other crimes three or more times, to wit, the crimes of robbery and burglary . . ." (R. 58-60). A copy of the information was served on petitioner on May 9, 1944 (R. 26). At the time, petitioner was confined in the penitentiary without financial

means to prepare a defense (R. 29). Immediately he petitioned "the Prison Officials to have access of Books of Law which would be an aid to him in preparing his own defense, • • • but these Books were denied him by the Prison Authorities" (R. 29) and "also was he denied a copy of the [Fourth Offender] Act itself, all access to any legal forms or books which may have been an aid to him in preparing a defense" (R. 33-34). On November 27, 1944, he was brought from the penitentiary into the Court of Quarter Sessions and the information charging him as a fourth offender was read aloud (R. 85-87). Without further explanation the petitioner was required to answer whether he was the person charged in the indictments listed in the information (R. 35, 88) and the District Attorney offered the prior indictments on which he relied in evidence. Petitioner was then asked whether he had anything to say before sentence was imposed. He protested that he was not guilty of the burglaries with which he had been charged (R. 93), apparently referring to Indictments Nos. 251-262 incl. on which he had pleaded guilty to receiving stolen goods and on which the burglary charges were not pressed. Petitioner also protested the unfairness of sentencing him again for crimes for which he had already been sentenced (R. 95-96). The court tried briefly to explain the nature of the proceeding but evidently it was not made clear to petitioner for the prosecutor commented "He doesn't understand" (R. 96). Petitioner was never advised that the court had discretion not to impose a life sentence. No evidence was offered and no plea was heard in mitigation.

Petitioner thereupon was sentenced to life imprisonment. The sentence of February 25, 1944 and the prior sentences were vacated (R. 60, 96, cf. R. 39, 41-42).

Petitioner has been actively seeking review of the sentence to life imprisonment ever since it was imposed. His current petition for *habeas corpus* alleges "that immedi-

ately after the life sentence was inflicted upon petitioner he, still being unfamiliar of the provisions of the Act, petitioned the Board of Trustees of the Eastern State Penitentiary to release funds from the Prisoners' Welfare Fund to hire counsel to appeal his conviction" (R. 30). Possibly the date is wrong for the petition also sets forth that the request was denied on the basis of a letter from the District Attorney dated December 21, 1945 (R. 31). In any event, on February 23, 1945, he wrote a letter to the prothonotary of the Supreme Court of Pennsylvania complaining that he did not have a fair trial (R. 1-3). The letter makes plain his lack of education and unfamiliarity with legal proceedings although, like his other pleadings, it shows that he has spent much time attempting to find a remedy for a procedure which he felt was fundamentally unfair. The Supreme Court of Pennsylvania treated the letter as a petition for *habeas corpus* but on March 19, 1945, it was denied (R. 3).

On September 13, 1945, petitioner filed a second petition for *habeas corpus* elaborating the confentions made in his earlier letter (R. 4-12). On October 1, 1945, the petition was denied as premature. The court filed a brief opinion pointing out that petitioner "is at present confined in the Eastern Penitentiary under prior sentences which are not attacked and which will not expire at the earliest until February 29, 1949. He is, therefore, now validly restrained of his liberty. Consequently his petition for habeas corpus must be denied" (R. 13). On October 18, 1945, petitioner sent a letter to the court which was followed on October 26 by a petition for reconsideration, in both of which he pointed out that the court had erred in stating that he was presently confined under the prior sentences, because they had been vacated in accordance with the Habitual Criminals Act (R. 16). On June 27, 1945, the petition for reconsideration was denied (R. 22). Petitioner repeated his conten-

tions in a petition for certiorari filed on March 26, 1947, which was also denied (R. 22-23).

On May 15, 1947, petitioner filed in the Supreme Court of Pennsylvania the petition for habeas corpus which forms the basis for the present proceeding in this Court. The petition (R. 24-38) alleged the facts which have been summarized and particularly pointed out that the court had erred in the earlier proceedings in holding that petitioner was being held under unexpired sentences antedating the life sentence (R. 24-25, 27, 37-38). A rule to show cause was issued and answers were filed by the warden and the district attorney. The warden answered that petitioner was being held under the life sentence imposed on Bill No. 461 and attached a certified copy of the commitment (R. 39-40). The district attorney's answer summarizes the previous petitions for habeas corpus and concedes that "the petitioner was technically correct" in pointing out that "he is serving nothing but a life sentence and the other sentences were vacated" (R. 40-42).

The record in the Court of Quarter Sessions was also certified to the Supreme Court. Thereafter on May 28, 1947, the Supreme Court of Pennsylvania entered an order discharging the rule to show cause and denying a writ of habeas corpus (R. 45).

Specification of Errors to Be Urged

The Supreme Court of Pennsylvania erred:

1. In failing to hold that under the circumstances set forth in the petition for habeas corpus, petitioner was constitutionally entitled to the assignment of counsel.

2. In failing to hold that under the circumstances set forth in the petition for habeas corpus, petitioner was sentenced to life imprisonment without due process of law.

3. In failing to hold that the Pennsylvania Habitual Criminals Act, as here applied, is void as an *ex post facto* law prohibited by Article I, Section 10, of the constitution.

4. In failing to hold that the Pennsylvania Habitual Criminals Act, as here applied, violates the Fourteenth Amendment by subjecting petitioner to imprisonment twice for the same offense.

5. In refusing the writ of habeas corpus.

Summary of Argument

I

The Court has jurisdiction to, and should, consider the federal questions raised by petitioner. Although the court below delivered no opinion, it seems plain that its decision cannot rest on State procedural grounds. A petition for habeas corpus is the proper method under Pennsylvania law for challenging a sentence imposed without the assistance of counsel or in violation of other constitutional rights. *Commonwealth ex rel. Schultz* v. *Smith*, 139 Pa. Super. 357, 367-368. Such petitions have been entertained on their merits where the challenge was to a life sentence as a fourth offender. *Commonwealth ex rel. Turpacke* v. *Ashe*, 339 Pa. 403. The decision of the court below denying petitioner's earlier application rested upon the mistaken belief that petitioner was serving previous sentences. The mistake was corrected in the present proceeding.

II

Petitioner was sentenced to life imprisonment without due process of law. Inherent in the notion of fairness is ample opportunity to meet an accusation. Under many circumstances the opportunity is ample only if the accused is represented by counsel. Hence "* * * where the defendant

is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." *Powell* v. *Alabama*, 287 U. S. 45, 71. This rule is as applicable to a proceeding on the issue of sentence under an Habitual Criminals Act as it is at other stages of the trial.

When petitioner was charged as a fourth offender, he was imprisoned in the penitentiary without funds or opportunity to prepare his case. He was refused permission to read the applicable statute. Although a sentence of life imprisonment might be imposed, he was not warned of his rights when he was brought before the court. His subsequent letters and pleadings make it plain that he lacked the intelligence and training to protect his own interests. No evidence or plea was heard in mitigation. Through ignorance and the want of counsel petitioner lost his statutory right to have the "justice" of the life sentence reviewed on appeal. In short, the record demonstrates without contradiction that unfairness permeated the proceeding which resulted in his confinement. Therefore the sentence is void.

III

The Pennsylvania Habitual Criminals Act, as here applied, is an unconstitutional *ex post facto* law. It also violates the Fourteenth Armendment by subjecting a fourth offender to two sentences for the same offense.

ARGUMENT

I

The Court has jurisdiction to, and should, consider in this proceeding petition's claims that he was deprived of liberty without due process of law.

It is the settled rule that this Court cannot undertake to review a judgment resting upon a State ground adequate to sustain it. *Honeyman* v. *Hanan*, 300 U. S. 14, 18; *Lynch* v. *New York*, 293 U. S. 52. The Supreme Court of Pennsylvania did not file an opinion explaining the basis of its order dismissing the petition for habeas corpus. Hence there lies at the threshold of the instant case the inquiry whether the Supreme Court of Pennsylvania dismissed the petition for habeas corpus on State procedural grounds, or ruled adversely on the merits to petitioner's claims that the life sentence was imposed in violation of the due process clause of the Fourteenth Amendment. Cf. *Williams* v. *Kaiser*, 323 U. S. 471; *Marino* v. *Ragen*, 332 U. S. 561. We submit that an analysis of the various proceedings instituted by petitioner in the State court, and of the pertinent precedents, makes it plain that the petition for habeas corpus was an appropriate method for attacking the life sentence on constitutional grounds and that therefore the federal question presented must have been decided by the court below. Cf. *Williams* v. *Kaiser*, 323 U. S. 471.

The writ of error *coram nobis* is rarely used in Pennsylvania (*Commonwealth* v. *Harris*, 351 Pa. 325, 327-330) and the commonwealth has not provided a statutory method for attacking an invalid sentence after the expiration of the term at which it was imposed. Habeas corpus, however, has been given liberal scope. It is available not only to challenge the jurisdiction of the court which passed the sentence but also to assert fundamental constitutional rights.

In *Commonwealth ex rel. Schultz* v. *Smith*, 139 Pa. Super. 357, 367-368, the governing principles were summarized as follows:

> • • • under the liberal and humane construction given by our Supreme Court to our Habeas Corpus Act (February 18, 1785, 2 Sm. L. 275), and the practice which has been established concerning it, there are certain basic and fundamental errors which may be corrected on habeas corpus, even though the defendant failed to appeal from the judgment, and which are recognized as exceptions to the principle relied on by the district attorney. For example, where an erroneous and illegal sentence has been imposed • • • whether it be excessive • • •, or a lumping sentence • • •, or a double sentence for the same offense • • •, or whether the minor offense is swallowed up in the greater • • •, or where the sentence was increased after the end of the term • • •, it may be corrected on habeas corpus, for the error is basic and fundamental and so destructive of justice, that it cannot be permitted to stand, even though not appealed from.
>
> So here, the denial of counsel to one accused of such grave crimes as were involved in this case, is not only a denial of a constitutional right, but is a basic and fundamental error striking at the fairness and justice of the whole trial, • • •. Such a basic and fundamental error, which affects the justice and regularity of the whole trial, may be relieved against in this Commonwealth by writ of habeas corpus.

In *Commonwealth ex rel. Penland* v. *Ashe*, 341 Pa. 337, 341-342, the Supreme Court approved the opinion quoted above as showing that "there are certain basic and fundamental errors which may be corrected on habeas corpus • • •".

Petitioner's chief contention is that he was denied a fair hearing because, although he was incapable of protecting his own interests, he was not given the assistance of counsel in his defense. This defect plainly falls within the

category of fundamental errors. *Commonwealth ex rel. Schultz* v. *Smith, supra;* cf. *Commonwealth ex rel. McGlinn v. Smith,* 344 Pa. 41. Likewise, the Supreme Court of Pennsylvania has considered on habeas corpus the contentions here made that the Habitual Criminals Act is unconstitutional. *Commonwealth ex rel. Foster* v. *Ashe,* 336 Pa. 238. It is also settled by the Pennsylvania decisions that habeas corpus will lie even though the prisoner is not entitled to be released from confinement. *Halderman's Petition,* 276 Pa. 1; *Commonwealth ex rel. Shaddock* v. *Ashe,* 340 Pa. 286; *Commonwealth ex rel. Nagle* v. *Smith,* 154 Pa. Super. 392; *Commonwealth ex rel. Madden* v. *Ashe,* 56 Atl. 2d. 335 (Pa. Super.).

In accordance with these principles the Supreme Court of Pennsylvania has entertained petitions for habeas corpus to determine the validity of life sentences imposed under the Habitual Criminals Act, Pennsylvania Penal Code of 1939, sec. 1108, Purdon's Penna. Stat., Tit. 18, § 5108, Appendix pp. 33-35, *infra.* In *Commonwealth ex rel. Dugan* v. *Ashe,* 338 Pa. 541, it appeared that the prisoner had been sentenced under three indictments. Under the first two indictments long term indeterminate sentences were imposed; under the third indictment the prisoner was given a life sentence to begin upon the expiration of the first two sentences. On a petition for habeas corpus the Supreme Court vacated the first two sentences and ruled that the life sentence should take effect immediately. Later the court entertained a second petition for habeas corpus filed by the same prisoner challenging the validity of the life sentence on the ground that an information charging him as a fourth offender had not been filed in accordance with the Habitual Criminals Act. The court ruled adversely to the prisoner's contention on the merits, but no question was raised concerning the prematurity of the petition or the appropriateness of habeas corpus. *Commonwealth ex rel. Dugan* v.

Ashe, 342 Pa. 77, certiorari denied 314 U.S. 610. In *Commonwealth ex rel. Turpack* v. *Ashe*, 339 Pa. 403, the court entertained a petition for habeas corpus and vacated a life sentence erroneously imposed under the Habitual Criminals Act even though the prisoner was still serving three other sentences which he did not challenge. It would seem plain, therefore, that under Pennsylvania law habeas corpus is a proper remedy for challenging an unlawful life sentence imposed under the Habitual Criminals Act, even though the prisoner may not be entitled to an immediate release.

Nothing in the opinion of the Supreme Court of Pennsylvania denying petitioner's earlier application for habeas corpus throws doubt on this conclusion. The opinion proceeded on the assumption that petitioner "is at present confined in the Eastern Penitentiary under prior sentences which are not attacked and which will not expire at the earliest until February 25, 1949" (R.13). For this reason the petition was said to be premature. *Ibid.* If the court's premise had been sound, the decisions cited in the opinion would support its conclusion. In *Commonwealth ex rel. Toliver* v. *Ashe*, 336 Pa. 206, the prisoner was detained (1) for violation of his parole under an earlier sentence not yet expired and (2) under a subsequent sentence to a term of imprisonment which was to be served concurrently with the imprisonment for parole violation. The court held that since the second sentence was not challenged, habeas corpus was not available. In *Commonwealth ex rel. Lewis* v. *Ashe*, 335 Pa. 575, the prisoner sought to challenge by habeas corpus a sentence imposed for the crime of escape; the court held that although the sentence for escape was erroneous, it would be premature to remand the prisoner for resentencing because his original sentence had not yet expired. In *Commonwealth ex rel. Sloan* v. *Ashe*, 133 Pa. Super. 32, it was held that habeas corpus to challenge one of

several concurrent sentences was premature if the application was made before the expiration of the other, valid sentences. *Contra: Commonwealth ex rel. Shaddock* v. *Ashe*, 340 Pa. 286. In all three cases, therefore, the prisoner was being held under two outstanding concurrent sentences one which he conceded to be valid and the other of which he sought to attack. None of them involved a sentence to life imprisonment as a fourth offender. Consequently, whatever the pertinence of those cases so long as it was erroneously assumed that petitioner was still serving an earlier sentence, they became plainly irrelevant once it was made to appear that the prior sentences had been vacated, leaving in force only the challenged sentence to life imprisonment.

In the present proceeding this crucial fact was properly brought to the attention of the court below. The petition for habeas corpus pointed out that the court had been under a misapprehension in the earlier case when it assumed that petitioner was serving several sentences (R. 24-25, 27, 37-38), and the district attorney conceded in his answer that the petitioner's contention that he was serving only the life sentence was technically correct (R. 41-42). The Habitual Criminals Act explicitly directs the court to "vacate any previous sentence". Penal Code of 1939, sec. 1108(d), Purdon's Penna. Stat., Tit. 18 § 5108(d), Appendix p. 34, *infra*. Under the circumstances the only reasonable inference is that the court considered petitioner's application on its merits in accordance with the principles governing the use of habeas corpus in Pennsylvania and the practice followed in *Commonwealth ex rel. Dugan* v. *Ashe, supra*, and *Commonwealth ex rel. Turpack* v. *Ashe, supra*.[2]

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[2] The decisions under paragraph (a) of the Habitual Criminals Act, which provides for a sentence twice the length of the normal sentence when a defendant is convicted of certain specified crimes for a second time, are too confused to be of value. In some cases the courts have refused to entertain applications challenging the imposition of the double sentence before the expiration of the normal minimum sentence which would be

Any other conclusion would seem to mean that Pennsylvania provides no timely judicial remedy even though petitioner shows that he is held exclusively by virtue of a life sentence imposed in violation of due process of law. This would be highly prejudicial. On the record the prior sentences have been vacated, and the warden holds petitioner only under the sentence of November 27, 1944 (R. 39-40). The prison authorities, the parole board and other executive officers, including the Governor on any appeal for clemency,[3] will treat petitioner as a life termer unless the courts correct the sentence; indeed they are probably obliged to follow this course. Cf. *Reception and Parole of Convicts*, 13 Dauph. 197; *Discharge of Convicts (Jacobs' Case)*, 14 Dauph. 61, 20 Pa. Dist. Rep. 471. While the difference in time may no longer be significant in this respect in petitioner's case, it is also to be taken into account that a delay until any underlying sentences have expired would often result in a hearing on a record which will be stale, with the witnesses scattered and their recollection dim. Nor can we suppose that the Pennsylvania courts, regardless of practical consequences, are wholly indifferent to the suffering imposed by delaying the opportunity for justice. Such a defect in its judicial system should not be attributed to a State the highest court in which has held that *habeas corpus* is available to challenge a sentence imposed in disregard of fundamental constitutional rights (*Commonwealth ex rel. Penland* v. *Ashe*, 341 Pa. 337, 341-342), and which declared recently, when *coram nobis* was improperly invoked, that "this court if convinced in any case brought

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imposed for the offense." [illegible] e. g. *Commonwealth ex rel. O'Leary* v. *Ashe*, 152 Pa. Super. 322, 156 Pa. Super. 235; cf. *Commonwealth ex rel. Grierson* v. *Ashe*, 353 Pa. 1. Other decisions reach the opposite result. *Commonwealth ex rel. Arnold* v. *Ashe*, 92 Pitts. L. J. 445, affirmed 156 Pa. Super. 451. And see *Commonwealth ex rel. Shaddock* v. *Ashe*, 340 Pa. 286; *Commonwealth ex rel. Webb* v. *Cain*, 158 Pa. Super. 222.

[3] The power to pardon and commute sentences is conferred on the Governor by Pennsylvania Constitution, Art. IV, Sec. 9. See also Purdon's Penna. Stat., Tit. 71, § 299.

before it that a grievous wrong has been done therein will promptly take appropriate measures to *undo* it." (*Commonwealth* v. *Harris*, 351 Pa. 325, 333).

Under the circumstances of the present case there is no basis for suggesting that this Court ought to infer that the petition was denied on procedural grounds because any other conclusion would imply that the court below approved a sentence passed in disregard of petitioner's constitutional rights. Compare the majority and dissenting opinions in *Williams* v. *Kaiser*, 323 U. S. 471. The court below has expressly held that the Fourteenth Amendment does not require an offer to assign counsel unless the defendant takes the initiative in requesting such assistance. *Commonwealth ex rel. McGlinn* v. *Smith*, 344 Pa. 41, 48; see also the answer to the petition for certiorari which was filed by the Commonwealth in *Townsend* v. *Burke*, No. 542, this Term. The court below has also ruled adversely to the other contentions made by petitioner on the merits. *Commonwealth ex rel. Foster* v. *Ashe*, 336 Pa. 238. Consequently, there is every reason to believe that in the instant case the court has followed its prior rulings on the federal questions and did not dispose of the petition on State procedural grounds.

II

The sentencing of petitioner to life imprisonment without the assistance of counsel, although he was incapable of protecting his own interests, deprived him of liberty without due process of law.

As pointed out in the Brief for the Petitioner in *Townsend* v. *Burke*, No. 542, the course of decision here defines with no little particularity the canons of decency and fairness which are embodied in the due process clause of the Fourteenth Amendment. Inherent in the notion of fairness is ample opportunity to meet an accusation. Under many

circumstances the opportunity is ample only when the accused has the assistance of counsel for his defense. Hence, while the Fourteenth Amendment, unlike the Bill of Rights, does not impose upon the States a rigid requirement of the assistance of counsel in all cases (*Betts* v. *Brady*, 316 U. S. 455; *Foster* v. *Illinois*, 332 U. S. 134), due process of law does require that counsel be appointed, whether requested or not, wherever such assistance is necessary to enable the accused adequately to present his answer to the charge against him. *Powell* v. *Alabama*, 287 U. S. 45, 71-73; *Williams* v. *Kaiser*, 323 U. S. 471; *Tomkins* v. *Missouri*, 323 U. S. 485; *Rice* v. *Olson*, 324 U. S. 786, 788-789; *De Meerleer* v. *Michigan*, 329 U. S. 663; see *White* v. *Ragen*, 324 U. S. 760, 763-764; *Hawk* v. *Olson*, 326 U. S. 271, 276; *Canizio* v. *New York*, 327 U. S. 82, 85. "And the need for such assistance may exist at every stage of the prosecution, from arraignment to sentencing" (*Carter* v. *Illinois*, 329 U. S. 173, 174).

It is our contention that the application of these settled principles to the facts stated in the petition for habeas corpus shows that the sentence imposed on November 27, 1944, is void because petitioner needed, but was not offered, the assistance of counsel in his defense. We base this contention on two propositions:

First. Since the imposition of sentence is discretionary under the Pennsylvania Habitual Criminals Act, due process forbids the sentencing of a defendant to life imprisonment without "the substance of a hearing" (*Palko* v. *Connecticut*, 302 U. S. 319, 327). The defendant must therefore be given ample opportunity, including the assistance of counsel if necessary, to prepare and present with understanding and intelligence those considerations which are favorable to his case. Stated otherwise, we submit that the same principles which are applicable to arraignment and trial, are no less applicable at the imposition of a discretionary life sentence.

Second. Since the record shows that petitioner was unable to prepare and present his case, the appointment of counsel was necessary, in this instance, to the substance of a hearing.

Our argument in support of these two propositions follows.

A. *Due process forbids sentencing a defendant to life imprisonment, under the Habitual Criminals Act, without "the substance of a hearing", including the assistance of counsel whenever the defendant is unable adequately to represent himself.*

The Pennsylvania Habitual Criminals Act, unlike the mandatory laws of many States, gives wide discretion to the court in passing sentence on a fourth offender. Penal Code of 1939, P. L. 872, § 1108, Purdon's Penna. Stat. Tit. 18, § 5108, Appendix, p. 33, *infra*. Clause (b) provides that when the prior convictions are shown at the trial for the fourth offense, the defendant—

> shall, upon conviction * * *, be sentenced, *in the discretion of the judge trying the case,* to imprisonment in a state penitentiary for the term of his natural life. [Italics supplied.]

Clause (d), which authorizes a separate proceeding on an information charging the defendant as a fourth offender at any time within two years of the fourth conviction, provides that—

> the court *may* sentence him to imprisonment for life *as prescribed in clause* (*b*) of this section : : : [Italics supplied.]

Furthermore, such a sentence can be appealed to the Supreme or Superior Courts "not only as to the alleged legal errors but also as to the justice thereof." The Supreme Court of Pennsylvania has taken note of the wide

discretion which these provisions confer upon the courts. *Commonwealth* v. *Ashe*, 336 Pa. 238, 240.

It needs no argument to demonstrate that the right to the substance of a hearing on the question whether a life sentence should be imposed is "a principle of justice so deep rooted in the traditions and consciences of our people as to be ranked as fundamental" (*Snyder* v. *Massachusetts*, 291 U. S. 97, 105). "The imposition of sentence in a criminal case is probably the most weighty action taken by a judge. No other type of final order or judgment may be said to equal a judgment fixing sentence in its far-reaching effect, both on society and on the individual immediately concerned." McGuire and Holtzoff, *The Problem of Sentence in the Criminal Law*, 20 B. U. L. Rev. 422, 426. Cf. *Carter* v. *Illinois*, 329 U. S. 173, 178. Under the Pennsylvania Habitual Criminals Act the importance of a hearing is greatly multiplied. As in the present case, the judge who imposes the sentence may not have heard evidence concerning any of the crimes. The imposition or withholding of sentence is entirely discretionary. The judgment may imprison the defendant for life—a sentence of which it has been said that "perhaps, after all, the penalty of life imprisonment is not so much a substitute for life imprisonment as a slower method of inflicting it" (*Commonwealth* v. *Ritter*, 13 Pa. Dist. & Co. 285, 293).

In view of these considerations the courts before which the question has arisen have generally held, under less compelling circumstances, that the defendant is entitled to the assistance of counsel when a discretionary sentence is passed. In *Batson* v. *United States*, 137 F. 2d 288, 289, the Circuit Court of Appeals for Tenth Circuit held—

> We believe that an accused should have an opportunity to be heard by counsel on the sentence to be imposed, and that a court should not impose sentence in the absence of counsel without expressly ascertain-

> ing that a defendant does not desire his presence. Many considerations influence the length of a sentence which is to be imposed, and a defendant should have the opportunity to have his attorney present any mitigating circumstances to the court for its consideration in determining the weight of the sentence.

Although the *Batson* case did not require a decision as to whether this was a constitutional right, the court adopted that view shortly later in *Thomas* v. *Hunter*, 153 F. 2d 834. These decisions were followed by the Ninth Circuit in *Wilfong* v. *Johnston*, 156 F. 2d 507, 510, which held that "because of the failure of petitioner to be represented by counsel at the time of pronouncement of judgment and sentence he was deprived of a constitutional right and, therefore, the judgment and sentence is void." See also *Kent* v. *Sanford*, 121 F. 2d 216, 218 (C. C. A. 5); *Coates* v. *Lawrence*, 46 F. Supp. 414, 4[illegible].

In the State courts the question raised has rarely been considered. We have found but one case where the right to have counsel present at the sentencing was denied, and the opinion relies wholly upon local statutes. *State* v. *Hughes*, 170 La. 1063. In *Miller* v. *State*, 44 S. W. 162 (Tex. Cr. App.) and *Commonwealth* v. *Polens*, 327 Pa. 554, the absence of the defendant's attorney was held not to be in error because it was plain that no prejudice had resulted. It is noteworthy, however, that in the latter case the court "condemned" the practice as "most unusual" (p. 556). Furthermore, in upholding the constitutionality of proceedings against habitual criminals to impose additional punishment, the courts have been careful to note that the right to a full hearing, including the assistance of counsel, was guaranteed. See e.g. *Levell* v. *Simpson*, 142 Kan. 892, 898; *State* v. *Zywicki*, 175 Minn. 508, 510.

Finally, while this Court has not considered the precise question, its opinions strongly indicate that the principles

which determine the right of the accused to counsel at earlier stages in a criminal proceeding are also controlling when he is sentenced. In *Powell* v. *Alabama*, 287 U. S. 45, 68, the Court referred to the layman's need for the guiding hand of counsel "at every step in the proceedings against him." In *Hawk* v. *Olson*, 326 U. S. 271, 278, was held that "denial of opportunity to consult with counsel on any material step • • • violates the Fourteenth Amendment." Later in *Carter* v. *Illinois*, 329 U. S. 173, 174, the Court specifically recognized that the need for the assistance of counsel "may exist at every stage of the prosecution from indictment to sentencing."

We do not mean to imply that every sentence passed in the absence of counsel is void for want of due process. As at other stages of a criminal prosecution the Fourteenth Amendment leaves the State considerable flexibility in formulating local procedures, provided that where issues of fact or law are to be determined the substance of a hearing is assured. Whether the assignment of counsel is essential to such a hearing will also depend upon the circumstances of the particular case. The weight of the permissible sentence, the range of discretion vested in the court, the opportunities the court has had at other stages of the prosecution to consider the character of the offense, and the defendant's opportunity as well as his ability to protect his own interests, are factors to be taken into account. When the sentence is attacked collaterally, the prisoner will be obliged to prove that "for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement" (*Foster* v. *Illinois, supra*, 137). Due process of law requires, however, that the rule of *Powell* v. *Alabama* be followed in sentencing as well as at other stages of a prosecution. In a proceeding under the Habitual Criminals Act, where the sentence may be to life imprisonment and "where the defendant is unable to employ counsel, and

is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law" (*Powell* v. *Alabama*, 287 U. S. 45, 71). Compare *Rex* v. *Andrews*, 27 Cr. App. R. 12 (Court of Criminal Appeal, 1938).

B. *Under the rule of Powell* v. *Alabama, it was the duty of the court to offer petitioner the assistance of counsel*

The uncontradicted allegations in the application for habeas corpus show beyond doubt that petitioner was sentenced to life imprisonment in disregard of the minimum standards of fairness laid down in *Powell* v. *Alabama* and subsequent cases. When petitioner was served with the information charging him as a fourth offender, he was confined in the penitentiary without the financial means of preparing a defense (R. 29). Paragraph 13 of the application avers that he immediately sought access "to Books of Law which would be an aid to him in preparing his own defense, and that these Books were denied him by the Prison Authorities" (R. 29). Paragraph 19 elaborates the allegation by asserting specifically that "also was he denied a copy of the Act itself" (R. 33-34). It is no answer to these allegations to assert either that defendant was "a seasoned criminal knowing the ways of the court" (cf. R. 31) or, alternatively, that access to legal materials would not have benefited petitioner because he lacked the necessary intelligence and legal training. Whatever other knowledge of court procedures he may have acquired, petitioner "was unfamiliar with the 'Fourth Offender Act,' knowing none of its provisions" (R. 30). And while it is true that petitioner was not capable of presenting his case adequately, it was the more unfair, in view of his want of counsel, to deny him even the opportunity to do what little he could. Upon read-

ing the Act, he might well have come to understand, first, that the trial court had discretion to withhold the maximum punishment, a point which passed unnoticed at the hearing (see p. 26, *infra*); second, that he was entitled to appeal not merely upon points of law but on the "justice" of the sentence; and, third, that on such an appeal the State would furnish a reasonable attorney's fee. According to petitioner's allegations this knowledge was kept from him by refusing his request for a copy of the statute. If the allegations are proved, the sentence is void for want of due process of law. Cf. *Cochrane* v. *Kansas*, 316 U. S. 255.

Quite apart from the prison authorities' suppression of petitioner's efforts to prepare a defense, however, the proceeding was unfair. Apparently friendless, petitioner's confinement alone would have raised insuperable obstacles to preparing an answer to the information or a plea in mitigation. Like any uneducated layman, he also had need for the aid of counsel "lest he be the victim of overzealous prosecutors, of the law's complexity or of his own ignorance or bewilderment" (*Williams* v. *Kaiser*, 323 U. S. 471, 476). The voluminous pleadings which he has filed since the life sentence was imposed are ample evidence that despite his diligence petitioner lacked the education and intelligence to prepare and present his case in court. (See especially the letter at R. 14-15.) At the hearing he endeavored to protect his interests but was so far incapable of comprehending the issues that the assistant district attorney remarked, "He doesn't understand" (R. 96). No plea in mitigation was presented and although the court in fact had discretion, the hearing was conducted as if life imprisonment were mandatory (see p. 26 *infra*).

Immediately after petitioner was sentenced he sought to appeal, but the prison authorities refused to release

funds for the purpose (R. 30).[4] Within two months he wrote a letter to the Supreme Court of Pennsylvania protesting that he had not had a fair hearing (R. 1-3), and shortly later he filed a layman's petition for habeas corpus (R. 4-12). These inept efforts to secure review of the trial court's action are proof that it was through ignorance and want of skill that the statutory right of appeal was lost; neither the court nor the district attorney nor the prison authorities took the trouble to point out that the statute provided for an appeal and an allowance of counsel fees. Taking all the circumstances together the case is comparable to the extreme illustration of fundamental unfairness cited in *Powell* v. *Alabama*, 287 U. S. 45, 72, where the Court said, quoting from *Hendryx* v. *State*, 130 Ind. 265, 269,—

> "Where a prisoner is without legal knowledge, is confined in jail, absent from his friends, without the aid of legal advice or the means of investigating the charge against him, it is impossible to conceive of a fair trial where he is compelled to conduct his cause in court, without the aid of counsel. * * * Such a trial is not far removed from an *ex parte* proceeding."

Not only is it plain that petitioner needed counsel but the record also demonstrates that "for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement" (*Foster* v. *Illinois, supra*, 134). Even at this late date and confined to the printed record, the unfairness of the proceeding is apparent in at least four specific respects:

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[4] The record is somewhat confusing on this point. Petitioner alleges that he sought to appeal "immediately" but that the prison authorities refused to release the necessary funds because of a letter from the assistant district attorney dated more than a year after sentence (R. 30-31). It is not improbable, however, that such a delay occurred in giving a final answer to the request for funds although it was presented immediately after sentence.

(1) The entire proceeding appears to have been conducted on the mistaken assumption that the court was obliged to sentence petitioner to imprisonment for life. Throughout the hearing Judge Kun repeatedly spoke as if the sentence were mandatory:

> * * * It becomes my duty, under the Act of Assembly, * * * to impose teh sentence *required by the Act.* (R. 94, fol. 154; italics supplied.)
>
> The law is that a person who has been found guilty of felony four times within the periods prescribed *must be punished because of those successive convictions.* (R. 94, fol. 155; italics supplied.)
>
> In other words, the law has come to this viewpoint: * * * [such an offender] *must be removed from the possibility of ever committing that offense again.* (R. 95, fol. 155; italics supplied.)
>
> I have to do my duty under the law. (R. 96, fol. 158.)

Even if the court did not act under this misapprehension, petitioner was given an erroneous impression and thereby led to omit whatever plea in mitigation he might have been able to present.

(2) On the question of sentence it was important to inquire further into petitioner's criminal activities. The superficial examination which is possible on this record strongly suggests that he was a petty sneak thief rather than a hardened gangster of the kind with which the Habitual Criminal Acts are chiefly intended to deal. In this respect the record of his fourth felony conviction is highly revealing. The principal witness, one Haas, saw a man, whom he later identified as petitioner, prowling about a house, put a rug against a window and start to break it with a rock. Then the witness ran and grappled with the man but he escaped. (See the testimony of Harry Haas in the certified transcript of record filed by petitioner as

Exhibit 3 to the Petition for Certiorari.) These were the offenses for which petitioner was convicted on Indictments Nos. 461 and 462 (R. 63-65).

The crimes covered by Indictments Nos. 251-262, inclusive, involved thefts of personal property ranging from $850 to $29, $11 and $20. (R. 66-84). Indictments Nos. 1679 and 1680 appear to have been based upon a robbery of $26.50 (R. 52-54). In other instances the sums were somewhat larger but the largest amount taken at any one time was property valued at $900. (Indictment No. 1107, R. 50-51). The total over a period of fifteen years was less than $3,000. These facts are obviously relevant on the issue of punishment. Cf. *People* v. *Buchanan*, 256 App. Div. 1010. Compare Hall, *Reduction of Criminal Sentences on Appeal*, 37 Col. L. Rev. 521, 539-540.

Nor is there any reason to suppose that petitioner was one of an organized gang of professional criminals. He was never indicted with others and the offenses which the transcripts filed by petitioner as exhibits describe, appear to have been committed by him alone. If investigation proved this to be the case, it also would have been a persuasive factor in mitigation. Michael and Wechsler, Criminal Law and Its Administration (1940), 22-23.

The practice of sentencing all fourth felony offenders to life imprisonment has proved unfair and ineffective. As a result of experience and criticism New York modified its statute so as to make the life sentence discretionary rather than mandatory. Michael and Wechsler, Criminal Law and Its Administration (1940), 984, n. 4. The Supreme Court of Pennsylvania has held that in imposing sentence under the statute in question "the circumstances of the crime" as well as the criminal record of the offender are to be taken into account. *Commonwealth ex rel. Foster* v. *Ashe*, 336 Pa. 238, 240. A judge to whose attention these considerations were called, together with the facts related

above, would certainly hesitate and probe deeper before concluding that petitioner should be imprisoned for life for the crime of breaking a window with intent to engage in petty thievery. The assistance of an attorney on this phase of the case was therefore of the utmost importance. Cf. Rubin, *The Public Defender*, 18 J. Crim. Law & Criminology, 347, 358.

(3) Although it is vain to speculate concerning petitioner's background, it is plain that there may have been a wealth of information concerning his character, habits and previous environment which ought to have been brought before the sentencing court. The evidence might have been accepted in the form of general testimony from relatives and friends. On the other hand there are many studies which indicate that the problem of recidivism may be approached more scientifically, and that with sufficient data a fairly reliable forecast of the defendant's future conduct can be made. See e.g. Sheldon and Eleanor Glueck, After-Conduct of Discharged Offenders (1946), 63-73. Such studies indicate that the likelihood of recidivism is to be gauged not only by the defendant's previous criminal record and penal experience but also by his industrial habits, economic responsibility, mental abnormalities, and the seriousness and frequency of previous crimes. Sheldon and Eleanor Glueck, Five Hundred Criminal Careers (1930), 281-282. While we cannot tell how far such a study of petitioner's background would have helped or injured his plea in mitigation, petitioner was entitled to the opportunity to have the considerations favorable to him developed and presented to the court.

(4) A successful appeal might have been taken from any adverse determination. Clause (d) of the Habitual Criminals Act provides for an appeal "not only as to alleged legal errors but also as to the justice thereof." (Appendix,

p. 34, *infra*.) The act itself recognizes the importance of counsel at this stage of a case for it provides that whenever the defendant is indigent, a reasonable counsel fee shall be paid by the commonwealth. In the instant case at least two potential grounds of appeal were available: first, the trial court erred in imposing a life sentence automatically without exercising the discretion vested in it by the Act; and, second, in view of the minor character of the offenses, the sentence was unjust. Petitioner lost his opportunity to appeal, not through indifference, but through ignorance and poverty. (See pp. 24-25 *supra*.)

The unfairness resulting from the lack of counsel could not be remedied under these circumstances by the intervention of the court. The considerations to be urged in petitioner's favor lay outside the record and required active investigation. In this kind of case the judge cannot effectively discharge the obligations of counsel. "He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences which sometimes partake of the inviolable character of the confessional" (*Powell* v. *Alabama*, 287 U. S. 45, 61). Compare *Betts* v. *Brady*, 316 U. S. 455, 471-473. In any event no such effort was made here. The record of the hearing bears out petitioner's allegation that he was called to answer the information "without being informed by the Court of the nature of the charge or your petitioner's reasons for being there, or being asked if he wanted an attorney * * *." Compare *Foster* v. *Illinois*, 332 U. S. 134. Later, when the court discussed the statute, the explanation was misleading (see p. 26, *supra*).

The averment last quoted also shows that there is no basis for a suggestion that petitioner waived counsel. "It is enough that a defendant charged with an offense of this character is incapable adequately of making his defense, that he is unable to get counsel, and that he does not intelli-

gently and understandingly waive counsel" (*Rice* v. *Olson*, 324 U. S. 786, 788-789). See also *Tomkins* v. *Missouri*, 323 U. S. 485; *De Meerleer* v. *Michigan*, 329 U. S. 663. Petitioner was manifestly incapable, for lack of education and intelligence, of making his own defense. He was confined in the penitentiary without funds, and therefore was unable to get counsel (R. 29, 35). The court did not inform him of his right to counsel and it is evident that he was not then aware of his constitutional right to such assistance. Consequently, there was no waiver.

III

The Habitual Criminals Act, as applied in this case, violates the Fourteenth Amendment.

The petition for habeas corpus challenges the sentence to life imprisonment on the ground that the Habitual Criminals Act, as applied in this case, violates the Fourteenth Amendment. The Act was first enacted on April 29, 1929. P. L. 854, Laws of 1929. One of the four convictions in view of which the life sentence was imposed, was for a crime committed in Maryland before the enactment of the Act (R. 88). Petitioner contends that the statute is unconstitutional because it is an *ex post facto* law (R. 36), subjected him to double jeopardy (R. 29, 36-37), punishes him for a crime committed outside the Commonwealth (R. 36) and unlawfully dispenses with indictment by a grand jury (R. 36).

These contentions have been carefully considered by this Court and others in decisions upholding the constitutionality of such statutes. *McDonald* v. *Massachusetts*, 180 U. S. 311; *Graham* v. *West Virginia*, 224 U. S. 616; *Carlesi* v. *New York*, 233 U. S. 51; *Levell* v. *Simpson*, 142 Kan. 892, appeal dismissed for want of a substantial Federal question 297 U. S. 695. See also 9 Ind. L. J. 534 and Annos. 58

A.L.R. 20, 82 A.L.R. 345, 116 A.L.R. 209, where additional cases are collected. We submit petitioner's contentions for the judgment of the Court with the request that it determine whether its prior decisions do not warrant reconsideration.

We wish to call special attention, however, to the allegation that petitioner has been sentenced three times for the same offense (R. 10, 29, 37, 95). On July 26, 1943, petitioner pleaded guilty to the charges of receiving stolen goods which were embraced within Indictments Nos. 251-262 inclusive, and was sentenced to imprisonment. At that time Indictments Nos. 1046 and 1047, to which he had pleaded not guilty, were awaiting disposition. The petition for *habeas corpus* alleges that both petitioner and his attorney understood that these charges were disposed of on July 26, 1943 together with Indictments Nos. 251-262 inclusive (R. 29). Although the docket entries recite the contrary, the certified transcript of the hearing held on July 26, 1943, supports the allegation for its caption refers to both sets of indictments and the testimony covered both sets of crimes. See Exhibit — filed in the office of the clerk in response to the answer to the petition for certiorari. Nevertheless, petitioner was tried on Indictments Nos. 461 and 462 on February 25, 1944, and sentenced to a long term of imprisonment. On November 27, 1944, he was once again brought into court on these indictments and the sentence of life imprisonment was imposed.

In prior cases it has been held that there is no violation of due process in proceeding against a fourth offender by a separate information filed after sentence for the last conviction has been imposed. *Graham* v. *West Virginia*, 224 U. S. 616; *Cross* v. *State*, 96 Fla. 768, 789; *People* v. *Gowasky*, 244 N. Y. 451; *People ex rel. Fernandez* v. *Kaiser*, 230 App. Div. 646, affirmed 256 N. Y. 581; certiorari denied 284 U. S. 631; American Law Institute, Code of Criminal Pro-

cedure (1930), § 403. Nevertheless, the petitioner urges that such a proceeding is fundamentally unfair, and the Court may wish to reconsider the question. The deep sense of injustice to which the statute gives rise is eloquently stated in petitioner's own appeals, first when he was sentenced (R. 95) and later to the court below.

Conclusion

The judgment of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted,

ARCHIBALD COX.
Counsel for Petitioner.

April 1948.

APPENDIX

Paragraphs of the Pennsylvania Habitual Criminals Act applicable to fourth offenders were first enacted on April 29, 1929 as P. L. 854. Its provisions were incorporated in the Penal Code of 1939, enacted June 24, 1939. P. L. 872, § 1108, 18 Purdon's Penna. Stat., Tit. 18, § 5108. The provisions are as follows:

"(a) Whoever after having been convicted within or without this Commonwealth of the crime, or attempt to commit the crime, of treason, murder, voluntary manslaughter, sodomy, buggery, burglary, entering with intent to steal, robbery, arson, mayhem, kidnapping, sale of narcotics, perjury, abortion, pandering, incest or any offense committed or attempted to be committed through the instrumentality of or with the aid of a deadly weapon or gunpowder or other explosive substance or corrosive fluid, may, upon conviction of any of such crimes for a second offense committed within five (5) years after the first offense, or subsequent offense committed within five (5) years after the prior offense, be sentenced to imprisonment for a term, the maximum of which shall not be more than twice the longest term prescribed upon a first conviction of the crime in question.

"(b) Whoever, after having been three (3) times convicted, within or without this Commonwealth, of crimes of the character set forth in clause (a) of this section, or of attempt to commit any such crimes, shall upon conviction of any such crimes for a fourth or subsequent offense, committed within five (5) years after the prior offense, be sentenced, in the discretion of the judge trying the case, to imprisonment in a state penitentiary for the term of his natural life.

"(c) In computing the period of time between convictions, as provided in clauses (a) and (b) of this section, any period of servitude by a person in a penal institution, within or without this Commonwealth, shall not be included in the computation of any of said five-year periods. It is

hereby declared that the intent of said clauses is that said five-year periods shall run only during the time any such person shall be at liberty.

"(d) If at any time within two (2) years, either after conviction or sentence, it shall appear that a person convicted of any of the crimes set forth in clause (a) of this section has previously been convicted of any such crimes three (3) or more times, it shall be the duty of the district attorney of the county in which the last conviction was had to file a complaint accusing the said person of such previous convictions, and to serve a copy of such information upon the defendant thirty (30) days before taking any further proceedings in court as hereinafter set forth. Thereupon the court in which the last conviction was had shall cause the said person, whether confined in prison, penitentiary or otherwise, to be brought before it, and shall inform him of the allegations contained in such complaint and of his right to be tried as to the truth thereof according to law, and shall require such offender to say whether he is the same person as charged in such complaint or not. If he says he is not the same person, or refuses to answer, or remains silent, his plea or the fact of his silence shall be entered on record, and a jury shall be empanelled to inquire whether the offender is the same person mentioned in the several records as set forth in such complaint. If the jury finds that he is the same person, or if he acknowledges or confesses in open court, after being duly cautioned as to his rights, that he is the same person, the court may sentence him to imprisonment for life as prescribed in clause (b) of this section, and shall vacate any previous sentence notwithstanding that the term of court in which the last sentence was imposed may have expired. Such sentence shall be reviewable on appeal by the Supreme or Superior Courts, not only as to alleged legal errors but also as to the justice thereof. Where any such defendant is indigent, the costs of appeal, together with reasonable counsel fee, shall be paid by the Commonwealth. Whenever it shall become known to any warden or prison, probation, parole or police officer, or other peace officer that any person charged with, or convicted of, cri[illegible] has been previously

convicted, within the meaning of this section, it shall become his duty forthwith to report the facts to the district attorney of the county.

"(e) A person need not be formally indicted and convicted as a previous offender in order to be sentenced under this section."

(5816)